

SAINT XAVIER UNIVERSITY,
Employer,
and
SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 1,
Petitioner.

ARGUMENT¹

I. THE AUTHORITY CONFLICT

A. Two Masters: Present in every building of Saint Xavier University

("Saint Xavier") is a statue honoring the author of the above statement,³ the One

¹ The National Right to Work Legal Defense Foundation files this brief without waiving any arguments concerning the Board's lack of a quorum. *See, Noel Canning v. NLRB*, ___ F.3d ___, 2013 WL 276024 (D.C. Cir. 2013).

² Matthew 28:18-20 (NIV).

³ Saint Xavier University's Request for Review of the Regional Director's Decision ("Request for Review"), p.16. The statue is of Jesus Christ.

who claimed all authority when it came to teaching. Insensitive to its entry on sacred ground, callous to claims of authority beyond the agency, the Regional Director has ordered the Church to submit to a different authority – that is, the regulatory authority of the Board. This authority issue triggers the constitutional problem that exists, at several levels, in this case.

According to the U.S. Supreme Court, the Board has no authority (jurisdiction) over Catholic Schools. *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979).

While the lack of Board authority to act in this matter is a serious constitutional defect, it is symptomatic of the greater constitutional problem this case presents. Saint Xavier and the Catholic Church answer to the One who proclaims all authority in the matter of teaching. The Board, on the other hand, resists all outside authority, even established higher judicial authority. *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382-83 (D.C. Cir. 1983). If the government, as explained below, may not control the teaching arm of a church, certainly a federal administrative agency is disqualified from regulating the day-to-day practices of a church in its teaching ministry.

B. Supervising Church Decision-Making Violates the Constitution's Religion Clauses: The Establishment Clause of the First Amendment prevents the State from regulating or supervising the religious work of churches. *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971); *Dayton Christian School v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 956-57 (6th Cir. 1985), *rev'd on other grounds*, 477 U.S. 619

(1986).⁴ In *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) the Court stated, “Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.” Yet, state participation in the affairs of the Catholic Church is precisely what the Board will do if it upholds the decision of the Regional Director.

The Regional Director asserted jurisdiction over Saint Xavier because it does not “base any hiring, retention, evaluation, or promotion decisions on the housekeepers’ religious affiliations or activities.”⁵ By looking only at the grounds on which employees are *not* hired, promoted, or fired, the Regional Director has succumbed to bureaucratic scotopia.

Instead, the Board’s proper focus should be the grounds on which Saint Xavier *does* make its decisions, and whether the State has taken control over a part of the teaching ministry of a church. At present, Saint Xavier carries on its religious ministry in accordance with its understanding of God’s will. If the Service Employees International Union, Local 1 (“Union”) wins the election, Saint Xavier will find that it answers to a different authority. Not only will it have to accept the Union as its equal partner in negotiating how certain aspects of its

⁴ This decision was reversed based on the U.S. Supreme Court’s application of the *Younger* abstention doctrine, and ultimately vacated and remanded by the Sixth Circuit. *Dayton Christian*, 802 F.2d 457(6th Cir. 1986). However, the Sixth Circuit’s analysis of the constitutional issues presented here is both extensive and persuasive.

⁵ RC Decision & Order, slip op. 2.

ministry will be effectuated, but its partnership with the Union will exist under the watchful eye and immediate authority of the Board. The problem with this forced partnership under the supervision of the Board is discussed next.

II. THE UNHOLY PARTNERSHIP

14 Do not be yoked together with unbelievers. For what do righteousness and wickedness have in common? Or what fellowship can light have with darkness? 15 What harmony is there between Christ and Belial? What does a believer have in common with an unbeliever? 16 What agreement is there between the temple of God and idols?⁶

A. Bargaining with Belial: Saint Paul pointed out, in the quotation above, an entanglement problem not grasped by the Regional Director. A single subject, employee health care, shows the myopic nature of the Regional Director's focus on the grounds on which an employee can be hired, promoted, or fired. Health insurance is a mandatory subject of bargaining. *In re Hardesty Co.*, 336 NLRB 258, 259 (2001) *enforced* 308 F.3d 859 (8th Cir. 2002). The U.S. Supreme Court has specifically noted that health care coverage for abortions is an issue determined by collective bargaining. *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977).

The Union takes a pro-abortion and pro-birth control position.⁷ The SEIU's web site carries a blog arguing, "[f]or women in America, there are not many

⁶ 2 Corinthians 6:14-16 (NIV).

⁷ <http://www.seiu.org/2012/11/how-much-could-womens-birth-control-costs-increase.php> last visited Mar. 4, 2013; <http://www.seiu.org/2012/10/womens-health-americans-wont-stand-for-gops-medica.php> last visited Mar. 4, 2013.

things *more* closely tied to our economic health than whether or not we are responsible for feeding, clothing and sheltering another human being.” (Emphasis in original).⁸

Since at least 847 A.D., at the First Council of Mainz, the Catholic Church has taught its members that procuring an abortion is a sin, justified under no circumstances: “The direct procuring of an abortion is never justified by any ‘indication’ nor by any human law; nor is it shown to be licit by appealing to the argument of self-defense or of extreme necessity.” Pius XI, *Encyclical on Christian Marriage*, 1930.

The Catholic Church also teaches that a member may not help to promote abortions. The *Vatican Declaration on Abortion*, 4 Origins 25 (1974), at 390.

The result is that, while the Union thinks abortion and birth control are important economic issues for which it must fight, the Catholic Church considers each a matter of sin. Imagine the Catholic Church being forced to negotiate employee health insurance with the Union, while supervised by the NLRB’s Regional Director who believes that the only relevant issue is whether Saint Xavier hires, promotes, and fires on the basis of religion? Obviously, the Union and the Regional Director are “unbelievers” in the sense that they view the matter much differently from the Church.

⁸<http://www.seiu.org/2012/11/how-much-could-womens-birth-control-costs-increase.php> last visited Mar. 4, 2013.

The Union promotes homosexual marriage. In *Hollingsworth v. Perry*, __ U.S. __, 133 S. Ct. 786 (2012), the Union was part of a federation asking the U.S. Supreme Court to declare California’s Proposition 8 unconstitutional.⁹ The Union’s International Executive Vice-President, Valarie Long, declared: “SEIU members, just like working people everywhere, believe federal laws should not financially penalize some workers simply because of whom they love and with whom they choose to build their life.”¹⁰ Thus, the Union views the issue of as a matter of love and finances.

The Catholic Church, on the other hand, interprets the “Sacred Scriptures [to present] homosexual acts as acts of grave depravity” and that “tradition has always declared that ‘homosexual acts are intrinsically disordered.’” Chastity and homosexuality, *Catechism of the Catholic Church* 2357 (Libreria Editrice Vaticana, 1994 ed.) (notes omitted). Although the Catholic Church counsels compassion, respect, and sensitivity towards homosexuals, and condemns “unjust discrimination,” *id.* at 2358, the Church’s position is that homosexuals are “called to chastity.” *Id.* at 2347.

The Union’s position is that domestic partners are entitled to health care,

⁹ *SEIU, Change to Win, AFL-CIO and NEA File Amicus Briefs in Historic Marriage Equality Cases*, found at: <http://www.seiu.org/2013/02/seiu-change-to-win-afl-cio-and-nea-file-amicus-bri.php> last visited on Mar. 1, 2013.

¹⁰ *Id.*

and the Catholic Church's view is that this promotes depravity – and a federal agency decides whether the Church is negotiating in good faith over its view of depravity. As Saint Paul wrote, "What harmony is there between Christ and Belial?" The conflict between the Church and the Union is obvious and unavoidable.

B. The State May Not Invade Church Autonomy: Amicus pointed out a specific area of conflict in bargaining, but this problem spills over into the next entanglement: the innate inability of the NLRB to properly sort out bargaining for religious schools. This does not require a specific citation to conflicting world views, but rather is *inherent in the process*. Listen to what the Seventh Circuit says:

The necessity of bargaining and negotiating with faculty members on conditions of employment *inevitably involves conflicts* concerning the religious program of the schools and infringement of the First Amendment Religion Clauses.

Catholic Bishop v. NLRB, 559 F.2d 1125, 1127 (7th Cir. 1977) (emphasis added).

The State can neither force the Church into negotiations with Belial nor superintend negotiations in which no harmony is possible. "[I]t would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114-15 (1952).

The idea that the church should be able to segregate its religious activities

from its secular activities, and comply with the NLRA as to its secular activities presents additional problems. “[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.” *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

By citing only the lack of a religious basis on which employees are hired, fired, or promoted, the Regional Director seems oblivious to the fact that he and this Board will be evaluating the conduct of the Catholic Church in negotiations and otherwise through the unfair labor practice procedures. Such on-going supervision is the very definition of a prohibited entanglement between church and state.

[T]he fact that the Commission will often be required to decide questions of intent, motive, causation, and pretext necessarily involves the state in assessing religious decisions. Such state involvement is ‘fraught with the sort of entanglement that the Constitution forbids.’

Dayton Christian, 766 F.2d at 959 (citing *Lemon*, 403 U.S. at 620).

In *Catholic Bishop*, 559 F.2d at 1125, the NLRB claimed: “that even if it were to intrude into doctrinal matters . . . the remedy would be, not to strip it of its general jurisdiction to adjudicate underlying unfair practice disputes, but simply to require it to decide its case without regard to the merits of the alleged doctrinal issues.” The court, *id.*, responded, “We have difficulty in following the Board's rhetoric.” Why was that?

We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

Id.

While the quote above deals mainly with discharge for activity contrary to doctrines of the Catholic Church, the identical logic applies to negotiations and unfair labor practice charges that touch on religious doctrines. Indeed, sorting out the religious from the secular is itself a problem. The “religious-secular distinction is difficult” because “the character of an activity is not self-evident.” *Amos*, 483 U.S. at 343 (Brennan, J. concurring). “[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs.” *Id.* at 343. Therefore “a categorical exemption” for such nonprofits is justified. *Id.* at 345-46.

The Supreme Court’s most recent pronouncement on state regulation of church activity is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, ___ U.S. ___, 132 S. Ct. 694 (2012). It held that the Religion Clauses of the

First Amendment bar the State from regulating in any way a church's removal of a pastoral employee. *Id.* at 706, 710. On one level, an observer might argue that *Hosanna-Tabor* involved a "minister" and housekeepers are not ministers. However, selecting the spokesperson for a ministry is simply one side of the constitutional problem; the other side is interfering with church autonomy. Justice Alito, joined by Justice Kagan, put a finger on that problem in their concurring opinion. They note that the church has long been a "critical buffer between the individual and the power of the State," and "a shield against oppressive civil laws." *Id.* at 712 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)). "To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.*

This case presents such a private sphere of sacred ground into which the Regional Director and the Board may not constitutionally enter.

CONCLUSION

For these reasons, the autonomy of the Catholic Church should be respected and the Regional Director's decision reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Amicus* Brief of the National Right to Work Legal Defense and Education Foundation, Inc. is being served upon the following persons by electronic mail and served upon the Regional Director of Region 13 via NLRB e-filing on this 8th day of March, 2013:

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